Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 125.

CHRISTOPHER L. WILLIAMS, as Receiver of the First National Bank of Mineral Point, Wisconsin,
Appellant,

v.

JOHN P. COBB,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF APPELLEE.

K. R. BABBITT.
Counsel for Appellee.

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STATEMENT.

This controversy comes before the Court on an appeal from a judgment of the United States Circuit Court of Appeals for the Second Circuit affirming a decree of the United States District Court for the Southern District of New York sustaining the defendant's demurrer and dismissing the bill of complaint herein.

The suit was brought to set aside the transfer of twenty shares of capital stock of the First National Bank of Mineral Point, Wisconsin, standing in the names of John P. Cobb and Calvert Spensley, as Trustees for one Catherine Monahan, and to have it declared that said stock was the property of the estate of Laura A. Cobb, deceased, the defendant's mother, from which he received a certain share as one of the legatees thereof, and that as such legatee, under a particular statute of Wisconsin, he

be held liable for an assessment of $2,000 levied against said stock (*fol.* 13).

The bill alleges that Laura A. Cobb at the time of her decease was the registered owner of more than 20 shares of the bank's stock; that under her will she directed her executors to invest the sum of $2,000 in interest-bearing securities and to pay over the income thereof to one Catherine Monahan, but that instead they took 20 shares of the bank's stock formerly owned by Laura A. Cobb and had them transferred on its books to themselves as trustees for Catherine Monahan, where they remained at the time of the failure of the bank (*fols.* 6, 7). The estate of Laura A. Cobb was finally distributed before the bank failed (*fol.* 9).

The defendant's demurrer to the bill was sustained by Judge Hough in a memorandum by him which will be found quoted in the opinion of the Appellate Court. An appeal was then taken by the Receiver to the United States Circuit Court of Appeals, which affirmed the decree of the lower Court in a unanimous opinion written by Judge Rogers, concurred in by Judges Lacombe and Coxe, (219 Fed. 663) and the appellant has taken an appeal to this Court from the judgment entered thereon.

We shall endeavor to show under the following points that the judgment appealed from should be affirmed.

I.

THE DECREE OF THE COUNTY COURT OF IOWA COUNTY, STATE OF WISCONSIN WINDING UP THE ESTATE OF LAURA A. COBB IS FINAL AND CONCLUSIVE AND CANNOT BE COLLATERALLY ATTACKED.

The estate of Laura A. Cobb had been wholly and finally distributed by her executors before the bank became insolvent, before the appointment of the Receiver and before the assessment was levied (*fol.* 9). The executors of said estate filed their final account in the County Court of Iowa County, State of Wisconsin, on July 28, 1908, more than a year before the bank failed, and made oath that said estate had been wholly distributed prior to that date, and that no other property or assets of the estate remained in their hands (*fol.* 10). It was, therefore, necessarily determined by said court that the transfer of said 20 shares of stock to the trustees of Catherine Monahan was proper and the finding of the court to that effect is binding and conclusive upon all interested parties, even strangers, including this Receiver. *Liginger* v. *Field,* 78 Wisc. 367. Black in his work on Judgments, (second edition) vol. 2, section 644, says that a decree of a probate court settling an executor's final account and discharging him from his trust after notice, in the absence of fraud, is conclusive upon all matters or items which came directly before the Court until reversed; that it will be presumed it was founded upon proper evidence and that every prerequisite to a valid discharge was complied with and cannot under any circumstances be impeached in a collateral proceeding.

The proceedings in the County Court of Wisconsin on the winding up and final settlement of said estate are conclusive as to all matters which were decided, or which might have been decided therein. *Cromwell* v. *County of Sac.*, 94 U. S. 351, at p. 358; *Fayerweather* v. *Rich*, 195 U. S. 276, at p. 300; *Henderson* v. *Henderson*, 3 Hare Chancery, 100, at p. 115; Black on Judgments (second edition), vol. 1, sections 245, 808. The proper forum in which the Receiver should have instituted his action was the County Court of Wisconsin. *Little Rock Junction Ry.* v. *Burke*, 66 Fed. 83, at p. 89; *Crouse* v. *McVicker*, 207 N. Y. 213. Black on Judgments (second edition), vol. 1, sections 297*a* and 302.

II.

NEITHER THE DEFENDANT NOR THE ESTATE OF LAURA A. COBB WAS A STOCKHOLDER OF THE BANK WHEN IT FAILED; THEREFORE, NO ASSESSMENT MAY BE LEVIED AGAINST HIM EITHER DIRECTLY OR THROUGH SAID ESTATE.

At the time of the failure of the bank the 20 shares of stock in question were registered in the names of John P. Cobb and Calvert Spensley, as trustees for Catherine Monahan, upon the bank's books (*fols.* 7, 8, 9, 10, 12 and 13). The exact date when the stock was transferred to the names of the trustees does not appear but it must have been over a year before the bank failed, since it is alleged that on or before July 28, 1908, the executors rendered their final account on the distribution of the estate (*fol.* 10).

The right to enforce this extraordinary stockholder's

liability and the nature and extent thereof must be found in the National Banking Law, as contained in Sections 5139, 5151 and 5152 of the United States Revised Statutes. Section 5139 of said Statutes provides that every person becoming a stockholder in a national bank succeeds to all the rights and liabilities of the prior holder. It has been held that where stock has been regularly transferred in good faith on the books of a corporation and insolvency is not imminent such transfer operates to release the transferor of all liability in respect thereto. The authorities in support of this proposition have been carefully collected by Judge Thompson in his work on Corporations (second edition), vol. 4, section 4371.

In *Robinson* v. *Southern National Bank of New York,* 94 Fed. Rep. 964 (1899), (affirmed 180 U. S. 295), Judge Wallace, writing the opinion for the United States Circuit Court of Appeals, Second Circuit, in considering the liability of a person under the National Banking Act, said that an examination of the cases decided by the Supreme Court failed to disclose one in which the owner of the shares had been held liable under the sections referred to, who had never been the owner upon the books of the bank and had never held himself out as a stockholder or enjoyed any of the privileges as such.

In the case at bar the defendant never was a stockholder nor was the estate of Laura A. Cobb a stockholder at the time the bank failed. Everything was done that could have been done to transfer the ownership of the stock in question from said estate to the trustees and it stood in their names for over a year before the bank failed.

Upon the death of Laura A. Cobb the executors became

vested with the title to said stock and they had a perfect right to sell or dispose of it as they saw fit. As Judge Rogers said in his opinion (*fol.* 41):

> "It cannot be assumed that the transfer of the stock was void and without effect. Under the common law rule and in the absence of any statute providing otherwise an executor or administrator has the absolute power to sell or dispose of the personal assets of the estate as he sees fit and can pass a good title to the property and it is not necessary to have any order of court for the purpose. *Munteith* v. *Rahn,* 14 Wis. 210; *In re Gay,* 5 Mass. 419; *Leitch* v. *Wells,* 48 N. Y. 585." See also 18 Cyc. 173; Cook on Corporations (second edition), vol. 1, section 329.

The bank could have been compelled by *mandamus* to make the transfer and having done so it was bound, and so is the Receiver, who stands in its place. *Scott* v. *Armstrong,* 146 U. S. 499; High on Receivers (fourth edition), section 205.

III.

THE TRANSFER OF THE STOCK ON THE BOOKS OF THE BANK TO THE TRUSTEES WAS SUFFICIENT TO CREATE A TRUST ESTATE ENTIRELY SEPARATE AND DISTINCT FROM THE ESTATE OF LAURA A. COBB.

When the stock was placed in the names of the trustees it ceased *ipso facto* to be the property of the estate and Cobb and Spensley from that time on held it as such trustees and no longer as executors. Judge Rogers on this point says in his opinion (*fol.* 41):

> "The legal difference between the two relations of executor and trustee is clearly defined and quite important, although it is sometimes difficult to de-

termine in a particular case whether an executor has ceased to hold a fund as executor and assumed the attitude of a trustee. In the case before us there seems to be no difficulty of that kind as the shares of stock were taken from the assets of the estate and transferred on the books of the company by the executors to themselves as trustees. In doing this the executors treated the stock as a separate trust fund and they held themselves out to the world as trustees of the fund for the *cestui que trust* Catherine Monahan. The stock then ceased to be a part of the assets of the testatrix and the executors ceased to hold as executors and from that time on have held as trustees."

See also *Ruffin* v. *Harrison,* 81 N. C. 208; *Matter of Johnson,* 170 N. Y. 139; 63 N. E. 63; *McWilliams* v. *Gough,* 116 Wis. 576; Hill on Trustees (fourth edition), page 335; Perry on Trusts and Trustees (sixth edition), vol. 1, section 263.

Nor was the consent of the *cestui que trust* necessary to vest title to said stock in the trustees; (*Fowler* v. *Gowing,* 152 Fed. 801 (affirmed 165 Fed. 890)) the action of the Executors at most being voidable at her election or the election of those interested in the estate and was not wholly void. Perry on Trusts and Trustees (sixth edition), vol. 2, sections 850-853; Beach on Trusts and Trustees, vol. 2, section 697; 39 Cyc. 413. At all events, the Receiver, who is a perfect stranger, cannot set aside the transfer. *French* v. *Shotwell,* 5 Johns. Ch. 555, 565; *Graham* v. *Railroad Company,* 102 U. S. 148.

IV.

TITLE TO THE STOCK IN QUESTION HAVING PASSED FROM THE COBB ESTATE TO THE TRUSTEES BEFORE THE BANK FAILED THE ESTATE IS NOT LIABLE.

In *Blackmore* v. *Woodward*, 71 Fed. 321 (U. S. Circuit Court of Appeals, 1895) it appeared that a testator bequeathed to his wife for life or widowhood forty shares of stock in a national bank, together with certain other property, and provided that she might use all of such property but on her death what remained should go in equal shares to his children. The administrator transferred the stock to the wife on the books of the bank before it became insolvent and an assessment having been levied on the stock suit was brought against the widow and judgment was obtained which remained unsatisfied. The receiver then brought a suit against the administrator to compel payment of the assessment out of the testator's general estate. Judge Taft, writing the opinion of the Court, concurred in by Judges Lurton and Hammond, held that whether the widow took an absolute title to the stock by virtue of her power of disposal or a life interest with remainder to the children the beneficial ownership of the stock in either case had passed from the testator's estate and that it could not be made liable for the assessment.

To the same effect see: *Witters* v. *Sowles*, 25 Fed. 168; 32 Fed. 130; *In re Box*, 1 Hemming & Miller, 552, 556; *Armstrong* v. *Burnett*, 20 Beavan, 424, 434; Jarman on Wills (sixth English Edition), vol. 2, p. 2035.

If the Cobb estate is not liable, then neither is this defendant.

V.

Former ownership of stock in question makes no difference in the absence of fraud.

The mere fact that the very stock which is the subject of this suit was formerly owned by testatrix cannot change the situation, nor is the Receiver in a position to question the action of the executors in transferring said stock from the estate to themselves as trustees in the absence of a specific allegation of fraud. *Sykes* v. *Halloway,* 81 Fed. Rep. 432-435; *Lucas* v. *Coe* 86 Fed. 972-974; *Fowler* v. *Gowing,* 152 Fed. 801 (aff'd 165 Fed. 891); *Williamson* v. *Beardsley,* 137 Fed. Rep. 467.

The bill will be searched in vain for any allegation or statement of fact charging fraud.

VI.

Reply to appellant's brief.

Appellant's counsel, on page 4 of his brief, refers to Section 2091 of the Wisconsin statute, which provides that every sale, conveyance or other act of a trustee in contravention of a trust is absolutely void. No reference was made to this statute in either of the Courts below nor is it pleaded in the bill. As appellant's counsel admits, it is contained in the statutes under the title relating to real property, but he argues that its application should be extended to personalty as well, citing *Graff* v. *Bonnett,* 31 N. Y. 9, in support thereof. If the contention of the appellant be sound then even before the enactment of Chapter 317 of the Laws of Wisconsin for

1903, quoted on page 3 of the appellant's brief and which now forms Section 2100-*b* of the Statutes of Wisconsin, an improper investment in stock would have been void. Many cases have been decided by the courts of Wisconsin dealing with the investment of trust funds from personal property, but in none we have examined, decided before or since the enactment of Section 2100-*b*, have they held an improper investment of trust funds absolutely void, nor have they referred to Section 2091 in determining the validity of an investment of such funds in contravention of the instrument creating the trust estate. At all events, it is sufficient to say that we believe the Courts of Wisconsin would not extend Section 2091 to cover personalty since in the case of *Lamberton* v. *Percles*, 87 Wis. 449-459, they have absolutely refused to follow the case of *Graff* v. *Bonnett* (*supra*), saying that in that case:

> "Denio, *C. J.*, dissented, and, after reviewing the prior decisions in that state, said: 'Hence, I conclude that there is nothing in our statute law which restrains the alienability of the interest of the beneficiary in a trust to receive and pay over the interest of money or of personal property.' 31 N. Y. 19. Thus it appears that notwithstanding the statutes of New York, so making the statutes respecting real estate also applicable to personal property, yet the highest court of that state very reluctantly reached the conclusions mentioned, and then only by a divided court. *In this state we have no statute making the chapter on uses and trusts, or any part of it, applicable to personal property.*" (Italics ours.) See also *Friedrich* v. *Huth*, 155 Wis. 196; *Managan* v. *Shea*, 158 Wis. 619.

On page 4 of the appellant's brief it is said that if the twenty shares of stock had remained in the Cobb estate

the funds of that estate could have been reached to pay the assessment, or if the stock had been sold, the purchaser would have been liable, but when placed under a trust which had no other assets there was no way the assessment could be obtained by the Receiver so long as the title remained in the trustees.

Section 5152 of the United States Revised Statutes provides that persons holding stock as trustees shall not be personally liable as stockholders, but that the estate and funds in their hands shall be liable. Whether the particular trust estate for which the twenty shares of stock were held by the trustees has other assets which might be applied on this assessment makes no difference, for as Judge Coxe said in *Lucas* v. *Coe,* 86 Fed. 972, at p. 973:

> "The fact that the defendant is responsible and the *cestui que trust* presumably irresponsible is a matter of no moment. There is nothing requiring a shareholder in a national bank to be solvent, and these shares may be held alike by the millionaire and the pauper. The question for the receiver in making an assessment is, who owns the shares, not who is best able to pay?"

Conclusion.

For the reasons herein stated it is submitted that the judgment should be affirmed.

New York, October 25, 1916.

K. R. BABBITT,
Of Counsel for Appellee.

WILLIAMS, AS RECEIVER OF THE FIRST NATIONAL BANK OF MINERAL POINT, WISCONSIN, *v.* COBB.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 125. Submitted November 17, 1916.—Decided December 18, 1916.

Defendant and another, executors, seeking in good faith to follow a testamentary direction to invest a sum in "interest bearing securities," on certain trusts, caused to be transferred to themselves as trustees certain National Bank shares belonging to the estate. Thereafter, their final account as executors, explaining this transaction and reporting the estate wholly distributed except for these shares, was approved by the proper court of Wisconsin. The bank afterwards becoming insolvent, suit was brought by the receiver to recover the amount of an assessment levied upon the shares by the Comptroller of the Currency, the bill seeking to hold the defendant, (who had received a larger amount as legatee), under a Wisconsin law making distributees liable for debts of estates in certain cases.

Held, (1) That whether or not the shares were "interest bearing securities," the transfer was not void.

(2) Title being in the trustees, the estate was not liable for the assessment, and consequently defendant could not be held as a distributee under the Wisconsin statute.

At common law executors have implied authority to pass title to personal assets of the estate—a rule which has not been modified in Wisconsin.

Section 2091, Wisconsin Statutes, 1913, providing that conveyances made by trustees in contravention of express trusts shall be absolutely void, does not apply to personal property.
219 Fed. Rep. 663, affirmed.

THE case is stated in the opinion.

Mr. John B. Sanborn and *Mr. Chauncey E. Blake* for appellant.

Mr. K. R. Babbitt for appellee.

MR. JUSTICE CLARKE delivered the opinion of the court.

In 1904 Laura A. Cobb died testate at Mineral Point, Wisconsin, and by her will directed her executors to invest the sum of $2,000 of her estate in "interest bearing securities," to pay the income thereof to Catherine Monohan during her life, and on her death to distribute the trust fund to certain persons designated in the will. The defendant, John P. Cobb, and one Calvert Spensley were appointed executors of Mrs. Cobb's will, and so administered her estate that in July, 1908, they filed their final account as executors, reciting that the estate was wholly distributed, with the exception of twenty shares of the capital stock of the First National Bank of Mineral Point, which the account stated the executors had caused to be transferred to themselves and registered in their names as trustees for Catherine Monohan.

The bank became insolvent and the Comptroller of the Currency on the third day of November, 1909, made an assessment of $100 upon each share of the capital stock of the bank for the payment of creditors.

The defendant was a son of the deceased, and, as legatee and distributee, received a sum of money greater than the amount of the assessment on the twenty bank shares.

The foregoing facts are all derived from the bill filed in

this case, to which the defendant demurred. The District Court sustained the demurrer and entered an order dismissing the bill. The Circuit Court of Appeals affirmed this decree, and the case is here upon appeal.

The theory upon which this suit was commenced is that the transfer of the twenty shares of bank stock by Cobb and Spensley, as executors, to themselves, as trustees for Catherine Monohan, is void; that the stock is as if it had never been transferred at all and is therefore an undistributed asset of the estate of Mrs. Cobb, and that the defendant, having received as legatee and distributee much more than the amount of the assessment, is liable under the Wisconsin statute to the Receiver for the assessment, a debt of the estate, all the other assets having been distributed before the failure of the bank.

Obviously the question as to the liability of the defendant turns upon whether the transfer of the stock to Cobb and Spensley, as trustees for Catherine Monohan, is void or voidable, for if it is voidable only this suit was improvidently commenced. At common law, and no Wisconsin statute is cited to modify the rule, an executor has full power, without any special provision of the will that he is administering or order of court, to sell or dispose of the personal assets of the estate, and thereby to pass good title to them. *Munteith* v. *Rahn*, 14 Wisconsin, 210; *In re Gay*, 5 Massachusetts, 419; *Leitch* v. *Wells*, 48 N. Y. 585; Perry on Trusts, §§ 225, 809. A sale by an executor, even to himself, is not void, but only voidable at the option of interested persons. *Grim's Appeal*, 105 Pa. St. 375; *Tate* v. *Dalton*, 41 N. Car. 562. And if, after such purchase from himself, an executor sells to another, the purchaser from him acquires a good title. *Cannon* v. *Jenkins*, 16 N. Car. 422.

No suggestion is made that the transfer of the stock by the executors to themselves as trustees was not made in good faith and it was obviously made under the conviction

that it was, if not "an interest bearing security," at least the equivalent of such a security. Very certainly this was the basis for the approval of the transaction by the appropriate Wisconsin court more than a year before the bank failed, and, for anything that appears in the record, prior to the time when the bank became insolvent.

The claim that the lower court failed to give proper effect to § 2091 of the Wisconsin statute cannot be allowed. The part of this section which is claimed to be applicable reads:

"When a trust shall be expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees in contravention of the trust shall be absolutely void."

This section is found in a chapter devoted to "Uses and Trusts" of the title "Real Property and the nature and quality of Estates Therein" and the claim is made that its drastic provision should be extended to trusts in personal property. No Wisconsin court has so applied it, but, on the contrary, the Supreme Court of the State, in *Lamberton* v. *Pereles*, 87 Wisconsin, 449, refused to make other sections of this same chapter respecting real estate applicable to personal property, saying "In this state we have no statute making the chapter on uses and trusts, or any part of it, applicable to personal property." It is significant also that in the statute dealing with "Trust Investments," no such provision is found. Wis. Stat. Sup., § 2100b.

It results that, since the executors had lawful authority to dispose of the bank shares, assets as they were of the estate, so long as the transfer is permitted to stand unassailed directly the title to them is in the defendant and Spensley, as trustees for Catherine Monohan, and that the estate of Mrs. Cobb is not liable to the Receiver for the assessment claimed. If the estate is not liable the

defendant, as legatee and distributee, is not liable and the claim in suit, obviously without natural equity, is therefore without technical merit and the decree of the Circuit Court of Appeals must be

Affirmed.